

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 OSWALDO ENRIQUE TOBAR, et al.,
12 Plaintiffs,
13 vs.
13 UNITED STATES OF AMERICA,
14 Defendant.

CASE NO. 07cv817 WQH (WMc)
ORDER

15 HAYES, Judge:

16 The matter before the Court is the Motion to Dismiss for Lack of Subject Matter
17 Jurisdiction, filed by the United States. (Doc. # 10).

18 **Background**

19 On May 4, 2007, Plaintiffs¹ filed a Complaint against the United States in the
20 Southern District of Texas. (Doc. # 1). The Complaint alleges that Plaintiffs are residents
21 of Ecuador. *Complaint*, p. 2. The Complaint alleges that on October 5, 2005, in
22 international waters off the coast of Ecuador, the United States Coast Guard Law
23

24 ¹ The named Plaintiffs are: Oswaldo Enrique Tobar, Francisco Gabriel Yole Arteago, Fausto
25 Lupercio Arias Castaneda, Frabricio Bayron Cedeno, Joffre Johnny Cedeno, Lindon Cleofe Cedeno,
26 Ramon Eliades Ramon Velez Cedeno, Daniel David Quimi Chalen, Pablo Eduardo Lucas Conforme,
27 Ramon Eduardo Pilligua Conforme, Ciro Mariano Lopez Mero, Pedro Manuel Lopez Mero, Jose
28 Eduardo Lucas Mero, Luis Antonio Penafiel Mero, Pedro Jose Reyes Mero, Telmo Arcadio Chica
Obando, Luis Miguel Cedeno Pico, Jaime Gustavo Palma Pinargote, Yardy Klever Flores Segovia,
Pacho Hernandez Solorzano, Carlos Wilfrido Veliz Velez, Jose Luis Zambrano Zambrano, Carlos
Orlando Velez Zambrano, Rosa Carmelina Zambrano Lucas, Junior Ivan Pico Alava, Segundo Matias
Zambrano Alonzo.

1 Enforcement Detachment (“Coast Guard”), which is owned and operated by the United
2 States, unlawfully and negligently “stopped, searched, arrested, detained and imprisoned
3 the Plaintiffs, seized the boat [and] destroyed the cargo and fish owned by Plaintiffs.” *Id.*
4 The Complaint alleges that this incident arose out of suspicion that Plaintiffs were
5 possessing and smuggling drugs. *Id.* The Complaint alleges that the Coast Guard acted
6 carelessly, recklessly, negligently, or intentionally during the incident, and caused injury to
7 Plaintiffs and their vessel. *Id.* at 3.

8 The Complaint alleges that this action “arises in part” under the Federal Tort Claims
9 Act (“FTCA”), 28 U.S.C. §§ 1346(b) and 2661, *et seq.*, the Suits in Admiralty Act
10 (“SAA”), 46 U.S.C. §§ 30901-30918, and the Public Vessels Act (“PVA”), 46 U.S.C. §§
11 31101-31113. The Complaint also alleges that the Coast Guard’s conduct violated
12 “international law,” “treaty obligations with Ecuador,” and Plaintiffs’ rights as protected by
13 the United States Constitution. *Complaint*, p. 3-4.

14 On May 4, 2007, the case was transferred from the Southern District of Texas to the
15 Southern District of California. (Doc. # 1).

16 On August 31, 2007, the United States filed a Motion to Dismiss for Lack of Subject
17 Matter Jurisdiction (“Motion to Dismiss”), pursuant to Rule 12(b)(1) of the Federal Rules
18 of Civil Procedure. (Doc. # 10). The United States moves the Court to dismiss this action
19 with prejudice for lack of subject matter jurisdiction on grounds that there has been no
20 waiver of its sovereign immunity under the FTCA, SAA or PVA, and Plaintiffs have failed
21 to establish any other basis for subject matter jurisdiction.

22 On September 5, 2007, Plaintiffs filed a Motion to Compel Discovery (Doc. # 16),
23 which asserted the need for additional discovery in order to oppose the Motion to Dismiss.
24 On November 7, 2007, United States Magistrate Judge McCurine issued an Order Denying
25 the Motion to Compel, concluding that discovery was not necessary for Plaintiffs to oppose
26 facts set out in the Motion to Dismiss. (Doc. # 24).

27 On November 13, 2007, Plaintiffs filed a Response in Opposition to the Motion to
28 Dismiss. (Doc. # 25). Plaintiffs oppose the Motion to Dismiss on grounds that sovereign

immunity has been waived pursuant to the SAA, that the Complaint alleges violations of Plaintiffs' rights as protected by the United States Constitution and international law, and that Plaintiffs are entitled to discovery.

On November 26, 2007, the United States filed a Reply to the Motion to Dismiss. (Doc. # 26).

Standard of Review

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move for dismissal on grounds that the court lacks jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1). The burden is on the plaintiff to establish that the court has subject matter jurisdiction over an action. *Assoc. of Medical Colleges v. United States*, 217 F.3d 770, 778-779 (9th Cir. 2000). In resolving an attack on a court's jurisdiction, the court may go outside the pleadings and consider evidence beyond the complaint relating to jurisdiction without converting the motion to dismiss into a motion for summary judgment. *Safe Air For Everyone v. Doyle*, 373 F.3d 1035, 1039 (9th Cir. 2004).

Discussion

I. Plaintiff's Discovery Request

Plaintiffs contend that the Court should deny the Motion to Dismiss and allow discovery because the Motion to Dismiss relies on jurisdictional issues which are so intertwined with substantive issues that discovery is needed to "find out exactly what the agreement was between the agents of the United States and the Ecuadorian government; and what effect the violation of the Coast Guard's regulations and agreement with the Ecuadorian government had on the so-called discretionary function defense, or law enforcement defense." *Response*, p. 9.

The United States contends that the portion of Plaintiffs' Response in Opposition to the Motion to Dismiss which addresses discovery is irrelevant to the Motion to Dismiss, and "for the most part [is] a verbatim repetition of plaintiffs' supplemental brief in support of the motion to compel, which was denied by Magistrate Judge McCurine." *Reply*, p. 3.

On November 7, 2007, Magistrate Judge McCurine issued an Order Denying Plaintiffs' Motion to Compel Discovery. (Doc. # 24). The Magistrate Judge concluded

1 that the discovery requested by Plaintiffs “is not necessary to demonstrate facts in
 2 opposition to the jurisdictional issues raised in [the] 12(b)(1) motion” and that the Motion
 3 to Dismiss “is clearly noticed and written as a motion to dismiss for lack of subject matter
 4 jurisdiction,” not a motion for summary judgment. *Id.* at 3.

5 Plaintiffs’ Response in Opposition to the Motion to Dismiss restates the arguments
 6 made in Plaintiffs’ Supplemental Brief in Support of the Motion to Compel (Doc. # 21),
 7 which the Magistrate Judge rejected. (Doc. # 24). The Court agrees with the Magistrate
 8 Judge that discovery is not necessary to demonstrate facts in opposition to the Motion to
 9 Dismiss. The Court concludes that Plaintiffs are not entitled to discovery to oppose facts
 10 set out in the Motion to Dismiss.

11 **II. Subject Matter Jurisdiction under the Federal Tort Claims Act, Suits in** 12 **Admiralty Act and Public Vessels Act**

13 The United States, as a sovereign, is immune from suit. *United States v. Mitchell*,
 14 445 U.S. 535, 538 (1980). A federal district court only has subject matter jurisdiction over
 15 a suit against the United States when sovereign immunity has been waived. *Argentine*
 16 *Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 (1989). “It is axiomatic that
 17 Congressional waiver of sovereign immunity is a prerequisite to any suit brought against
 18 the United States.” *Roberts v. United States*, 498 F.2d 520, 525 (9th Cir. 1974). A waiver
 19 of sovereign immunity as contained in any statute “will be strictly construed, in terms of its
 20 scope, in favor of the sovereign.” *Lane v. Pena*, 518 U.S. 187, 192 (1996).

21 **A. Subject Matter Jurisdiction under the Federal Tort Claims Act**

22 The United States contends that the FTCA generally waives sovereign immunity for
 23 tort claims against the United States in federal court, but excepts from its general waiver of
 24 sovereign immunity claims cognizable in admiralty. The United States contends that the
 25 FTCA does not provide subject matter jurisdiction over this action because Plaintiffs’
 26 claims “sound solely in admiralty.” *Mot. to Dismiss*, p. 4. The United States also contends
 27 that even if the FTCA applied to this action, its sovereign immunity would still be retained
 28 because the discretionary function and foreign country exceptions to the FTCA’s waiver of
 sovereign immunity apply.

1 Plaintiffs appear to agree that this action is cognizable in admiralty and that the
2 FTCA does not apply, stating that the FTCA “despite being supplanted in maritime claims,
3 still is used for guidance since the scope of tort liability within the jurisdiction of admiralty
4 includes actions based on negligence, claims for damage to vessels or cargo, claims for
5 personal injuries on navigable waters, etc.” *Response*, p. 4.

6 The FTCA generally waives the United States’ sovereign immunity for its torts to
7 the same extent a private actor would be liable. 28 U.S.C. §§ 1346(b), 2680(b). However,
8 actions within the admiralty jurisdiction of the federal courts are explicitly excluded from
9 the FTCA. *Id.* “Although the FTCA usually provides the waiver in tort actions, the FTCA
10 is inapplicable where an admiralty claim exists.” *Williams v. United States*, 711 F.2d 893
11 (9th Cir. 1983). A tort claim falls within the admiralty jurisdiction of the federal courts if
12 (1) the tort occurs on or over navigable waters (the “locality” or “situs” test), and (2) the
13 actions giving rise to the tort claim “bear a significant relationship to traditional maritime
14 activity” (the “nexus” or “relationship” test). *Taghadomi v. United States*, 401 F.3d 1080,
15 1084 (9th Cir. 2005).

16 Plaintiffs do not dispute that the events giving rise to their claims occurred on
17 navigable waters and bear a significant relationship to traditional maritime activity.
18 The “locality” or “situs” test is satisfied because Plaintiffs’ claims derive from the
19 boarding, search and seizure of Plaintiffs’ vessel in navigable waters off the coast of
20 Ecuador. *See Taghadomi*, 401 F.3d at 1084. The “nexus” or “relationship” test is satisfied
21 because all of the claims alleged in the Complaint derive from Coast Guard operations of
22 stopping, boarding, searching and seizing Plaintiffs’ vessel. *See Kelly v. United States*, 531
23 F.2d 1144, 1148 (2d Cir. 1976) (holding that operations of the Coast Guard bear a
24 significant relationship to traditional maritime activity). The Court concludes that Plaintiffs
25 have failed to meet their burden of establishing subject matter jurisdiction under the FTCA
26 because this action falls within the admiralty jurisdiction of the federal courts.

27 **B. Subject Matter Jurisdiction under the Suits in Admiralty Act**

28 The United States contends that the SAA generally waives sovereign immunity in
admiralty actions, but that the discretionary function exception retains sovereign immunity

1 for conduct that involves an element of choice and is grounded in policy considerations.
2 The United States contends that the SAA does not provide a basis for subject matter
3 jurisdiction in this action because the discretionary function applies.

4 Plaintiffs contend that the discretionary function exception does not apply to this
5 action because the Coast Guard's acts involved the implementation of clear Coast Guard
6 mandates under objective criteria and were not grounded in social, economic or political
7 policy considerations.

8 The SAA provides that "[i]n a case in which, if a vessel were privately owned or
9 operated, or if cargo were privately owned or possessed, or if a private person or property
10 were involved, a civil action in admiralty could be maintained, a civil action in personam
11 may be brought against the United States or a federally-owned corporation." 46 U.S.C. §
12 30903. However, a well-recognized exception to the SAA's general waiver of the
13 sovereign immunity is the "discretionary function" exception. *Earles v. United States*, 935
14 F.2d 1028, 1032 (9th Cir. 1991). The Supreme Court has articulated two factors (the
15 "*Gaubert* factors") for courts to consider when determining whether the discretionary
16 function exception applies to a particular case: (1) whether the nature of the challenged
17 conduct involved "an element of judgment or choice," and (2) whether "social, economic or
18 political policy" considerations are implicated. *United States v. Gaubert*, 499 U.S. 315,
19 322-23 (1991); *see also Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988).

20 In *Mid-South Holding Company, Inc. v. United States*, 225 F.3d 1201 (11th Cir.
21 2000), the Eleventh Circuit addressed "whether the 'discretionary function' exception to
22 the waiver of the sovereign immunity found in the [SAA] precludes a claim arising out of
23 the allegedly negligent performance of a search of a vessel by the [Coast Guard]." The
24 Eleventh Circuit noted 14 U.S.C. § 89(a) grants the Coast Guard authority to "make
25 inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and
26 waters over which the United States has jurisdiction for the prevention, detection, and
27 suppression of violations of the law of the United States [and] at any time go on board of
28 any vessel . . . and examine, inspect and search the vessel and use all necessary force to
compel compliance." 14 U.S.C. § 89(a). The court concluded that the Coast Guard's law

1 enforcement authority, articulated in 14 U.S.C. § 89(a), leaves the Coast Guard “a great
2 deal of discretion . . . in deciding which vessels to board and search, thus satisfying the first
3 prong of the *Gaubert* analysis.” *Id.* at 1205-1206. The court went on to state that “the on-
4 site decisions of the [government] agents concerning the manner in which to search the
5 vessel also fall within the scope of the discretionary function exception . . . [b]ecause no
6 statute or corresponding regulation prescribes the methodology for boarding or searching a
7 vessel.” *Id.* at 1206-1207. The court concluded that the second *Gaubert* factor was
8 satisfied because “the decision to board and search a vessel is the product of the balancing
9 of various compelling policy considerations.” *Id.* at 1205-06, fn. 6; *see also B&F*
10 *Trawlers, Inc. v. United States*, 841 F.2d 626, 631 (5th Cir. 1988) (holding that “the
11 discretionary function exception in principle shields from tort liability the Coast Guard’s
12 apprehension and transportation of drug-running vessels”).

13 Plaintiffs allege that the Coast Guard unlawfully stopped, searched and seized
14 Plaintiffs’ vessel suspected of drug smuggling. To support the contention that this
15 allegedly unlawful conduct was discretionary, the United States submitted the Declaration
16 of Brad J. Kieserman, the Chief of Operations Law at U.S. Coast Guard Headquarters, who
17 attests that “[a]t all times, the Coast Guard is operating under its authority in 14 U.S.C. § 89
18 whenever it conducts maritime law enforcement,” and that “the decision to conduct a
19 boarding, the personnel who shall comprise the boarding team, and the manner of
20 conducting the boarding is always left to the discretion of the on-scene Commander or
21 Officer in Charge and Boarding Officer.” *Kieserman Decl.* ¶¶ 8, 11. The first *Gaubert*
22 factor is satisfied because the only evidence in the record demonstrates that the decision to
23 stop, board, search and seize suspected drug smuggling vessels and the manner in which
24 government agents conduct such activity is discretionary. *See* 14 U.S.C. § 89(a); *Mid-*
25 *South Holding Co.*, 225 F.3d at 1205; *Kieserman Decl.* ¶¶ 8, 11. The second *Gaubert*
26 factor is satisfied because the challenged conduct implicates “social, economic or political
27 policy considerations” in light of Congress’ declaration that “trafficking in controlled
28 substances aboard vessels is a serious international problem and universally condemned”
and that “such trafficking presents a specific threat to the security and societal well-being

of the United States.” *See B&F Trawlers, Inc.*, 841 F.2d at 631 (quoting 46 U.S.C. § 1902). The Court concludes Plaintiffs have failed to establish subject matter jurisdiction under the SAA because the discretionary function exception applies, retaining sovereign immunity.

C. Subject Matter Jurisdiction under the Public Vessels Act

The United States contends there is no waiver of sovereign immunity under PVA because Plaintiffs have not satisfied their burden of demonstrating “that a similar action in plaintiffs’ national courts (Ecuador) would be allowed if a United States national were the plaintiff there.” *Mot. to Dismiss*, p. 23. The United States contends that the PVA does not provide subject matter jurisdiction because Plaintiffs have failed to demonstrate reciprocity, which is a jurisdictional prerequisite to the waiver of sovereign immunity under the PVA.

The Complaint and the Response in Opposition to the Motion to Dismiss generally assert that this action arises pursuant to the PVA, but neither address reciprocity.

The PVA waives sovereign immunity in admiralty actions for “damages caused by a public vessel of the United States.” 46 U.S.C. App. § 781. Pursuant to the “reciprocity” provision of the PVA, nationals of a foreign country “may not maintain a civil action under this chapter . . . unless it appears to the satisfaction of the court in which the action is brought that the government of that country, in similar circumstances, allows nationals of the United States to sue in its courts.” 46 U.S.C. § 31111; *see also United States v. United Continental Tuna*, 560 F.2d 569 (9th Cir. 1977). The plaintiff must demonstrate reciprocity, which is required for sovereign immunity to be waived under the PVA. *United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976).

Plaintiffs have failed to demonstrate reciprocity because they make no assertion in the Complaint or Response in Opposition to the Motion to Dismiss that the government of Ecuador would allow United States nationals to sue in its courts under similar circumstances. In failing to address reciprocity, Plaintiffs have failed to satisfy the jurisdictional prerequisite to the waiver of sovereign immunity under the PVA. *See United Continental Tuna Corp.*, 425 U.S. at 164. The Court concludes that Plaintiffs have failed to establish subject matter jurisdiction under the PVA because there is no waiver of sovereign

1 immunity under the PVA.

2 **III. Subject Matter Jurisdiction under the United States Constitution or**
 3 **International Law**

4 The United States contends that Plaintiffs have failed to establish subject matter
 5 jurisdiction under the United States Constitution because “neither the Constitution nor the
 6 laws passed in pursuance of it have any force in foreign territory unless in respect of our
 7 own citizens,” Plaintiffs “admit they are all citizens of Ecuador, not the United States,” and
 8 there “is no allegation that plaintiffs have any connection with the United States at all,
 9 either geographically or legally.” *Mot. to Dismiss*, p. 23-24 (quoting *United States v.*
 10 *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)). The United States contends that
 11 Plaintiffs have failed to establish subject matter jurisdiction under international law because
 12 they “neither identify any tenet of customary international law, or any treaty or bilateral
 13 agreement which may have been abridged, much less provide a basis for jurisdiction.”
 14 *Mot. to Dismiss*, p. 24.

15 Plaintiffs respond that “[h]ere we have the Ecuadorian fisherman subjected to nine
 16 days at sea and then they were detained again on shore. The U.S. Constitution may not
 17 apply four hundred miles out in the Pacific ocean, but international law and human decency
 18 should still prevail despite the illusions of the U.S. Coast Guard.” *Response*, p. 24.

19 “Neither the Constitution nor the laws passed in pursuance of it have any force in
 20 foreign territory unless in respect of our own citizens . . . and operation of the nation in
 21 such territory must be governed by treaties, international understandings and compacts, and
 22 the principles of international law.” *United States v. Curtiss-Wright Export Corp.*, 299
 23 U.S. 304, 318 (1936). Absent authorizing legislation, “an individual has access to courts
 24 for enforcement of a treaty’s provisions only when the treaty is self-executing, that is, when
 25 it expressly or impliedly provides a private right of action.” *Tel-Oren v. Libyan Arab*
 26 *Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (citing *Head Money Cases*, 112 U.S. 580,
 27 598-99 (1884)).

28 The Complaint alleges that the Coast Guard’s conduct violated Plaintiffs rights as
 protected by various amendments of the United States Constitution. Plaintiffs, however, do


1 not assert that they are citizens of the United States, that their Constitutional claims arose in
2 the United States, or that they otherwise have any connection with the United States that
3 would grant them standing to sue under the United States Constitution in federal court. The
4 Court concludes that Plaintiffs have failed to demonstrate subject matter jurisdiction under
5 the United States Constitution. *See Curtiss-Wright Export Corp.*, 299 U.S. at 318.

6 The Complaint also alleges that the Coast Guard's conduct violated "treaty
7 obligations with Ecuador" and "violated international law by boarding and seizing a
8 foreign flagged vessel in international waters." *Complaint*, p. 3. Plaintiffs, however, fail to
9 identify any specific treaty or tenet of international law under which they are suing. The
10 Court concludes that Plaintiffs' general allegations that the United States violated a treaty
11 with Ecuador and international law are insufficient to satisfy their burden of demonstrating
12 the Court has subject matter jurisdiction under international law.

13 Conclusion

14 The Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. # 10) filed by
15 the United States is **GRANTED**. The Complaint is **DISMISSED with leave to amend**. If
16 Plaintiffs wish to amend the Complaint, they must file and serve a First Amended
17 Complaint within thirty (30) days of the date of this Order.

18 DATED: January 15, 2008

19 
20 **WILLIAM Q. HAYES**
21 United States District Judge
22
23
24
25
26
27
28